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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 518.

ROBERT E. DINEEN, Superintendent of Insurance of the State of New York, as Liquidator of New York Indemnity Company, *Petitioner*,

v.

THE UNITED STATES.

(Petition denied March 8, 1948)

PETITION FOR REHEARING.

CAMDEN R. McATEE,
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Rule 33, allowing a petition of rehearing after denial of the original petition for grant of writ of certiorari, supports further appeal to the discretion of the Court. Interest in such further presentation is shown in grants of petitions in cases after the denials both of the original petition and the first petition for rehearing.¹

Additional reason for this second appeal to the discretion of the Court is the procedural limitations upon the

¹ *Group No. 1 Oil Corporation v. Bass*, 283 U. S. 279. *Stone v. White*, 301 U. S. 532.

discretion applicable to cases from the United States Court of Claims. *Per Curiam*,² such discretion has been held to be limited by the procedure established for determination of claims against the United States. Consequently, only questions of law are to be presented because the findings of fact by the Court of Claims are equivalent to and of the same effect as the special verdict of a jury; a mixed question of law and fact is conclusively determined by a finding of fact unless the question is separable to disclose what and where is the mistake of law; the absence of the evidence underlying a finding so limits the consideration as to prevent the conclusion of fact from being overruled, subject to consideration whether the ultimate finding is so necessarily overcome by subordinate or circumstantial findings that the judgment is not substantial in point of law.

Within these limitations, petitioner respectfully invokes the discretion of the Court in inquiry as to the propriety of certiorari as centering around a substantial question of law where the findings of fact disclose three separate and distinct acts of the government, each tending to eliminate the liability for liquidated damages which the decision holds to be always in effect.

The contract obligation of the contractors was to proceed with diligence necessary to insure completion of the work within 150 calendar days from May 21, 1928, and thereby before October 18, 1928, and, if the right to proceed was not terminated by the government, to be liable in liquidated damages of \$100 for each calendar day of delay beyond the completion date not excused as the result of an act of the government or for other reasons not here material.³ The contract obligation of the government was to make monthly payments of advance estimates to the contractors.⁴

² *United States v. Esnalt-Pelterie*, 303 U. S. 26.

³ Article 9; Petition Appendix p. 17; R. p. 11.

⁴ Article 16, Petition Appendix p. 18; R. p. 12.

Three ultimate findings of fact, unaffected by any subordinate findings, are submitted as relevant to the above contract provisions. The first point is the act of the government in waiver of timely and diligent performance before the contractors began their work.

Finding 6,⁵ after stating the 150 days for the timely performance of the contract lay between May 21 and October 18, 1928, shows the government was more interested in the liquidated damages than in diligent timely performance, for it proceeds:

The contractors did not begin the contract work until July 21, 1928, when approximately 40% of the contract time had elapsed, although the defendant's officer in charge of the project, urged the contractors to proceed and called their attention to the contract provision relative to liquidated damages.

This position of the government is submitted to be a complete waiver of the timely performance upon which its right to liquidated damages would depend. Although timely completion of the contract was thus precluded in order not to forfeit mounting liquidated damages, the government allowed the contractors to proceed, despite their total failure to perform for 60 days of the contract time.⁶

The second point is the admitted default of the government upon its contract obligation to pay due monthly payments to the contractors as a termination of the contract and of all liability of the contractors for liquidated damages.

⁵ R. p. 12; Petition p. 6. Derivative Finding 20, (R. p. 20), that from July 21st to September 25th in the next 66 days only 14% of the contract was performed is confirmation of continued waiver by the government of timely performance.

⁶ Thus, in 1928, the government position under Article 9 is that put forward by the government as its possible position in 1944 in argument of *United States v. American Surety Company*, 322 U. S. 96, and summarized in the opinion of the Court. The petition, p. 12, urges the necessity of amplification of the *American Surety* opinion.

Finding 8⁷ is completely ultimate in recital of correspondence between the government and contractors that establishes (a) government admission, on October 1st, within the contract period, of its inability to pay the due or subsequent monthly estimates⁸ until Congress voted new appropriations; (b) the government proposal that the contractors agree to proceed forthwith upon their own resources and thus obviate issue of the otherwise necessary stop-order; (c) the counter proposal of the contractors and its acceptance by the government that the contractors would proceed to the extent of available resources and, upon their exhaustion, be entitled to the stop-order; (d) the subsequent government issue of the stop-order when the contractors had exhausted their resources.

This finding is submitted as establishing termination by the government of the contractor obligation or right to proceed with any further performance, and of all liability in liquidated damages—all consequent upon the default of the government upon its obligation to pay the monthly estimates, and its consent to and acceptance of substituted effort by the contractors.⁹

The third point is the lack of need for timely completion of the work in 150 days. Finding 4¹⁰ is that the contract, at its execution on May 21, 1928, embraced construction of a stretch of highway, designated as a portion of Section D, Route 1, in the Sequoia National Park. Finding 7¹¹ is that the government section was reduced from 2.65 to 1.96 miles in length and eliminated the interval Clover Creek Bridge and its approaches. Finding 14¹² is that, on April 3, 1929,

⁷ R. pp. 12, 13, 14; Petition p. 7.

⁸ The same confessed inability under other National Park contracts to pay due estimates is declared to breach the contract *Shuler & McDonald v. United States*, 85 Ct. Cls. 631, *Joplin v. United States*, 89 Ct. of Cls. 345. Other citations in Petition, p. 13.

⁹ *Phillips etc. v. Seymour*, 91 U. S. 646.

¹⁰ R. p. 10, Petition p. 4.

¹¹ R. p. 12, Petition p. 5.

¹² R. p. 17, Petition p. 6.

nearly a year later, neither Section C previously completed by the contractors, nor Section D would be of any use until the government would provide three bridges preceding these sections, and would add 29 miles of road as additional to Section D.

These findings are submitted as evidencing that timely completion was not material because the pattern of improvements was inadequate, and that, without the necessity of timely completion, there could be no damages in that aspect either for liquidation or actual assessment. Consequently, the provision for liquidated damages is entirely penal.

Additional reasons for favorable discretion are that the Court of Claims decision is only reviewable by certiorari, and that the decision below is a cloud upon settled precedents applicable to the construction of government contracts and provisions for liquidated damages.

ARGUMENT.

The above ultimate findings are submitted in themselves to show government waiver of timely performance, government termination of liquidated damages liability and government lack of damage for untimely performance due to its inadequate pattern of improvement. The findings are submitted to show material questions of law are involved in the decision below, which, ignoring said findings, holds the original liability for liquidated damages always remained in full effect.¹³

As a cloud upon settled precedents, the decision below affects the legal limitations upon liquidated damages. They

¹³ The opinion (R. p. 23) distinguishes the present case from *American Surety Company* by statement that herein the government did not terminate the contract, but did terminate in the cited case, adding herein: "It probably would have been entitled to do so because of the contractors tardiness in performance. But it only issued a suspension order, and plaintiff after the suspension, resumed performance and completed the work."

are permitted where timely performance is of the essence of the contract as agreed compensation for the indefinite damages resulting from untimely performance that cannot otherwise be reasonably appraised. Consequently, they fall away if the contracted timely performance be waived or forfeited by breach,¹⁴ or if the provision be only a spur or incentive to performance and not a measure of appreciable damages.¹⁵ The precedents are that parties must each perform entirely their respective contract obligations precedent to insistence upon timely performance or alternative damages.¹⁶ Consequently, any liability in liquidated damages is discharged where the government allows contractors to proceed to completion despite inexcusable delays so as not to forfeit mounting liquidated damages, and thus precludes prompt completion of needed structures.¹⁷ Consequently, the contractors are relieved of all liability, either for further performance or for any liquidated damages, when the government defaults upon its obligation to pay due monthly estimates.¹⁸ Article 9 expressly provides the liability for liquidated damages is only effective if the government does not terminate the right to proceed.¹⁹

The foregoing ultimate findings involve no mixed questions of law and fact; they are unaffected by the absence of underlying evidence; and they are paramount over any subordinate findings. They clearly raise the question of law whether the decision properly or erroneously disre-

¹⁴ This ignores that the refusal to pay estimates creates the right to abandon or to continue performance for completion in a reasonable time subject to actual damages (*Phillips v. Seymour*, *supra*), and that these contractor rights prevail over a subsequent termination (*Brooklyn etc. Co. v. United States*, 97 Ct. Cls. 532).

¹⁵ *Priebe and Sons v. United States*, 322 U. S. 407.

¹⁶ *Phillips etc. v. Seymour*, *supra*, Note 9.

¹⁷ *United States v. American Surety Co.* *supra*, Note 6.

¹⁸ *Commercial Casualty Co. v. United States*, 83 Ct. Cls. 376, Petition p. 13.

¹⁹ *Supra*, Note 3.

garded them in holding the liquidated damages liability was always in effect.

In emphasis of the error below in the departure of the decision from settled precedent, it appears the decision may be cited as upholding a liability for liquidated damages:

I. Where the government consents to inexcusable delays that preclude timely completion.²⁰

II. Where the government defaults upon its contract obligation to pay due monthly estimates to the contractor.

III. Where the government accepts substituted performance not provided for in the contract.

IV. Where the acts of the government disclose no need for timely performance and no basis for any damage.

V. Where there is no damage and the collection is penal or in *terrorem*.

Petitioner abides the further consideration of the petition herein by the Court.

Respectfully submitted,

ROBERT E. DINEEN, Superintendent
of Insurance of the State of New
York, as Liquidator of New York
Indemnity Company,

By CAMDEN R. McATEE,
Attorney for Petitioner.

²⁰ The precedents contrary to these propositions are:

- I. *Phillips etc. v. Seymour, supra*, Note 9.
- II. *Myerle v. United States*, 33 Ct. Cls. 1, 25.
- III. *Phillips etc. v. Seymour, supra*, Note 9.
- IV. *Kothe v. Taylor Trust*, 280 U. S. 224.
- V. *Wise v. United States*, 249 U. S. 361, 365; *Priebe & Sons v. United States, supra*, Note 15.

CERTIFICATE OF COUNSEL.

The foregoing Petition for Rehearing is hereby certified
as presented in good faith, and not for delay.

CAMDEN R. McATEE,
Attorney for Petitioner.